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No. 07-544

In the Supreme Court of the United States

CHRIS CHRONES, WARDEN, *Petitioner,*

v.

MICHAEL ROBERT PULIDO, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MANUEL M. MEDEIROS
State Solicitor General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5974
E-mail: jeremy.friedlander@doj.ca.gov
Counsel for Petitioner

ARGUMENT

I.

RESPONDENT'S PROPOSED HARMLESS ERROR TEST IS IRRECONCILABLE WITH *BRECHT* AND *CHAPMAN* BECAUSE IT MAKES ALTERNATIVE-LEGAL-THEORY ERROR NECESSARILY REVERSIBLE.

The Ninth Circuit found that the error in this case was governed by a rule it derived from *Stromberg* v. *California*, 283 U.S. 359 (1931): the submission to the jury of an unconstitutional alternative legal theory requires reversal if a reviewing court is uncertain whether the jury relied on that theory. See Pet. App. 11a-12a. Calling the error "structural," Pet. App. 11a, the Ninth Circuit declined to apply the harmless error test that governs non-structural error, or "trial error," on habeas review. Under that test, relief is permitted only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993).

Respondent now concedes that the instructional error in this case was not structural and that the Ninth Circuit was wrong in thinking it was. RBM 17 ("the Ninth Circuit was mistaken in its 'structural defect' nomenclature"); RBM 21 ("the Ninth Circuit may have contributed to confusion on this score by describing *Stromberg* as a form of 'structural defect' analysis").[1/] Nonetheless, respondent says that the

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1. Renouncing the "structural defect" label for the first time, respondent ignores his own earlier promotion of the Ninth Circuit's "confusion." When the Ninth Circuit sought supplemental briefs on the impact of *Lara* v. *Ryan*, 455 F.3d 1080 (9th Cir. 2007), respondent argued: "Under *Lara* and previous cases, submission of a legally unauthorized theory is a structural defect, which requires reversal where this court cannot be 'absolutely certain' the jurors relied on a correct ground." Appellee's Supplemental Letter Brief, dated Aug. 30,

Ninth Circuit was correct to apply the *Stromberg* test, as a so-called "*categorical* application of harmless error analysis." RBM 34. He thus characterizes the *Stromberg* test as equivalent to the *Brecht* test and, for that matter, to the more stringent "beyond a reasonable doubt" test for cases on direct review set forth in *Chapman* v. *California*, 386 U.S. 18, 24 (1967). See RBM 33 ("Where a court's review of the record leaves it uncertain whether the jurors relied on the valid or the invalid theory, that uncertainty necessarily represents both a 'reasonable doubt' (*Chapman*) and a 'grave doubt' (*Brecht-O'Neal* [v. *McAninch*, 513 U.S. 432 (1995)]) as to the error's effect."); RBM 34-35. In sum, respondent argues that the Ninth Circuit inadvertently but faithfully applied the *Brecht* test by applying *Stromberg*. See RBM 35, 51.

Respondent has changed the label affixed to the Ninth Circuit's analysis, but the result is the same. In both his view and the Ninth Circuit's: (1) the error would have been harmless only if it had not occurred (i.e., if the jury had not relied on the erroneous theory), and (2) the error is necessarily prejudicial because it did occur (i.e., because the jury may have relied on the erroneous theory). By conflating error with harm, respondent elevates instructional error into "categorical" prejudice and substitutes that construct for a determination of actual harm. Respondent's "categorical" prejudice is structural error by another name.

With his *Stromberg*-based "harmless error" test,

2006, p. 2 (bold-face type and initial capitalization omitted). Respondent's opposition to the petition for certiorari similarly argued: "Uncertainty regarding the ground for a verdict requires reversal under *Stromberg*, regardless of whether the error is deemed a 'structural defect' or a 'trial error.'" Br. in Opp. 10 (bold-face type and block capitalization omitted). Only now does respondent admit no "structural defect" exists.

respondent asks this Court to accept what it has firmly rejected. In *California* v. *Roy*, 519 U.S. 2 (1996) (per curiam), this Court found that the equivalent of respondent's test is not part of *Brecht*. In *Neder* v. *United States*, 527 U.S. 1 (1999), the Court implicitly reached the same conclusion about the *Chapman* test. See Section A, *post*.

Respondent's "*categorical* application of harmless error analysis," RBM 34, is in reality a test only for error: a reasonable likelihood that the jury misapplied the law by relying on an unconstitutional theory. *Pope* v. *Illinois*, 481 U.S. 497 (1987), exposes respondent's mistake because *Pope* is irreconcilable with respondent's harmless error analysis. See Section B, *post*.

Respondent maintains that only a *Stromberg*-type test avoids tainting harmless error analysis with fact-finding reserved for a jury. This argument rests on a misunderstanding of what a correct harmless error analysis entails. To test for harmless error, a reviewing court does not find facts, as a jury would, but instead considers the evidence in light of the jury's particular findings in order to decide whether the jury would have convicted had it been properly instructed. Respondent's *Stromberg*-based test, limited as it is to a determination of whether the jury actually relied on the correct theory, unjustifiably requires reversal of convictions when the same verdict would have resulted regardless of the error. See Section C, *post*.

This Court's *Brecht* test does not call for a *Stromberg* "jury reliance" inquiry. *Brecht* asks instead what the jury would have done absent the error. See Section D, *post*.

A. This Court Has Rejected Formulations Of The *Brecht* And *Chapman* Tests That Are Equivalent To Respondent's *Stromberg*-Based Harmless Error Test.

Respondent argues, "Where [1] there is evidentiary support for the invalid theory, [2] the valid theory is controverted, and [3] *no other verdict conclusively establishes which theory the jurors adopted*, that uncertainty compels a finding of prejudice under either a *Chapman* or a *Brecht* standard." RBM 37-38 (emphasis added). The first two prongs of this test are derived from well-settled rules. First, when alternative correct and incorrect theories are submitted to the jury, affirmance of the conviction is required if the incorrect theory is not supported by substantial evidence, *Griffin* v. *United States*, 502 U.S. 46, 60 (1991). Second, an unconstitutional omission of an element is harmless when the defense conceded the element, see *Neder* v. *United States*, 527 U.S. at 19-20. However, the harmlessness of the error when either circumstance is present does not mean that the absence of such a circumstance creates actual prejudice.[2/]

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2. Respondent misinterprets dicta in *Neder*, 527 U.S. at 19, as requiring reversal when the trial court errs by failing to instruct on an element of the offense and "*the evidence on the omitted element is in conflict or genuinely disputed*[.]" RBM 29. But *Neder* did not rule out other circumstances under which a contested omitted element would be harmless. For example, if a jury finds that the defendant used a deadly weapon but, because it was not instructed to do so, fails to determine whether the deadly weapon was a firearm, the jury's finding of deadly-weapon use may make the omission harmless even if the defendant contested both elements by saying he never used a weapon. *Washington* v. *Recuenco*, 548 U.S. 212, 220-22 (2006), found error of the foregoing type possibly harmless under *Neder* without considering whether the omitted element was contested. *Recuenco* thereby suggests that, contrary to respondent's view, an omitted element is not necessarily prejudicial if the element was contested. In any event,

Further, respondent's proposed test fails on its third prong, the notion that alternative-legal-theory error is prejudicial if "no other verdict conclusively establishes" that the jury "adopted" a correct theory. *California* v. *Roy*, 519 U.S. 2, repudiated an equivalent standard as an improper statement of the *Brecht* test. In *Roy*, the trial court's aiding and abetting instruction correctly required the jury to decide whether the defendant knew of the perpetrator's purpose but erroneously failed to require the jury to decide whether the defendant also intended to aid the perpetrator. 519 U.S. at 3. The Ninth Circuit granted habeas relief by applying an erroneously altered form of the *Brecht* standard. Under that test, "'the omission [of the "intent" part of the instruction] is harmless only if review of the facts found by the jury [namely, assistance and knowledge] establishes that the jury *necessarily* found the omitted element [namely, "intent"].'" *Id.* at 4. This Court rejected the Ninth Circuit's test, stating that "the 'harmless error' standards enunciated in *Brecht* and *O'Neal* should apply to the 'trial error' before us as enunciated in those opinions and without the Ninth Circuit's modification." *Roy*, at 6. The "verdict conclusively establishes" prong of respondent's test is no different from the "jury necessarily found" formulation the Court rejected in *Roy*.

Respondent's test also conflicts with the "beyond a reasonable doubt" harmless error test of *Chapman* v. *California*, 386 U.S. at 24. *Neder* v. *United States* held as much when it rejected the defendant's proposed test for evaluating harm from an instructional error on an element of an offense. See 527 U.S. at 13. Like respondent, the defendant in *Neder* argued that harmless error analysis

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Neder never addressed the *Brecht* harmless error inquiry that applies in habeas corpus cases.

should focus on whether "other facts necessarily found by the jury are the 'functional equivalent' of the omitted, misdescribed, or presumed element." *Id.* The "necessarily-found, functional-equivalent" test rejected in *Neder* is indistinguishable from respondent's "verdict conclusively establishes" test. Respondent cannot explain how his proposed standard, in effect rejected by this Court as even stricter than the *Chapman* test, could nevertheless be equivalent to the less stringent *Brecht* test.

B. *Pope* v. *Illinois* Demonstrates That Respondent's *Stromberg*-Based Harmless Error Test Conflates Error And Harm.

The "verdict conclusively establishes" prong of respondent's test makes alternative-legal-theory error harmless only if the jury actually decided what it was required to decide in order to convict. Respondent's test confuses error with harm. If the record leaves uncertain whether the jury actually decided what the law requires for conviction, that uncertainty amounts to nothing more than constitutional error. A finding of error triggers rather than concludes harmless error analysis. To decide whether the error is harmless, a reviewing court considers whether, in light of the evidence, the jury's particular findings (defective and otherwise) show that the jury would still have convicted had it been properly instructed.

Pope v. *Illinois*, 481 U.S. 497, clarified the distinction between "error" and "harm" and, likewise, demonstrates how respondent's test (like *Stromberg*) conflates the two. The defendants in *Pope* were convicted of selling obscene magazines. *Id.* at 499. The trial court instructed the jury with an erroneous definition of obscenity—one that unconstitutionally required the jury to decide whether an ordinary member of the community, rather than a reasonable person, would find serious value in the allegedly obscene material. *Id.* at 500-01. The Court had to decide

"whether the convictions should be reversed outright or are subject to salvage if the erroneous instruction is found to be harmless error." *Id.* at 501. This Court remanded for a harmless error inquiry. *Id.* at 504.

In reaching its decision, the Court described in general terms what the proper harmless error test is and is not:

> To say that the jury "would have found it unnecessary to rely on the presumption," *Connecticut* v. *Johnson*, 460 U.S. 73, 97, n.5 [1983] (Powell, J., dissenting), or that the impermissible instruction was "superfluous," *Rose* [v. *Clark*], 478 U.S. 570[,] [580] (1986), is not to say that the reviewing court can retrace the jury's *deliberative processes* but that the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same.

Pope v. *Illinois*, 481 U.S. at 503 n.6 (emphasis added). In terms of the case before it, the Court defined harmlessness as follows: "if a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines, the convictions should stand." *Id.* at 503. The Court added in a footnote that "[t]he problem with the instructions in both [*Rose* and *Pope*] is that the jury could have been impermissibly aided or constrained in finding the relevant element of the crime: in *Rose*, by the erroneous presumption; in this case, by *possible reliance on* unreasonable community views on the value question." *Id.* at 503-04 n.7 (emphasis added).

Harmless error analysis does not turn, then, on "the jury's deliberative processes," *Pope*, at 503 n.6, or on the jury's "possible reliance on" an improper legal standard, *id.* at 503-04 n.7. A reviewing court asks instead whether the jury would have convicted had it been properly instructed. *Id.* at 503 n.6. *Pope* found nothing inconsistent in a verdict that was simultaneously (a) defective because of the jury's

"possible reliance" on an improper standard, yet (b) "subject to salvage if" the jury would have convicted absent the error. Those two circumstances effectively define (a) error and (b) harmless error. The error is what the jury did or *could have done wrong*—relying on an incorrect standard to find an element of the crime. The harmlessness is what the jury *would have done right*—reaching the same verdict under proper instructions. See *Neder*, 527 U.S. at 12 (absence of a "complete verdict" on every element of the offense establishes only constitutional error); *id.* at 18 (harmless error inquiry is: "Is it clear beyond a reasonable doubt that the jury would have found the defendant guilty absent the error?").

How, then, as a practical matter, can a reviewing court find both that a jury possibly relied on an erroneous instruction to find guilt—the error—yet also that the jury would still have convicted under proper instructions—the harmlessness? To state the process in general terms: the court considers the strength of the evidence in relation to the size of the "gap" between the jury's particular findings and the unmade required finding. The more strongly the evidence supports the unmade required finding, and the closer the jury's particular findings come to that finding, the more likely it will be that the jury's findings show that the jury would have made the required finding had it been properly instructed and, therefore, that the error was harmless.

Pope provides a good example. The jury found no value in the magazines under a "community" standard instead of a "reasonable person" standard. A reviewing court could conclude that the difference between the particular and required findings was small enough, and the evidence of the required finding strong enough, that the result would have been the same under a proper instruction. See *Neder* v. *United States*, 527 U.S. at 13-14 (recognizing the error in

Pope necessarily created a "'gap' between what the jury did find . . . and what it was required to find to convict[,]" yet the error was subject to harmless error analysis). As Justice Scalia put it in explaining why the error in *Pope* could be harmless, "I think it implausible that a community standard . . . would cause any jury to convict where a 'reasonable person' standard would not." *Pope* v. *Illinois*, 481 U.S. at 504 (Scalia, J., concurring).

Respondent's test of harmless error would have required a different outcome in *Pope*. If respondent's "verdict conclusively establishes" test were correct, the *Pope* Court would have proceeded to decide whether the error was reversible—much as the Court did before it fundamentally changed the harmless error test in *Rose* v. *Clark*, 478 U.S. 570. See *Connecticut* v. *Johnson*, 460 U.S. at 87 (finding reversible error based on the Court's determination that the defendant did not concede the element on which the jury was wrongly instructed). Because the remand in *Pope* would have been unnecessary if respondent's test were right, that test must be wrong.

Respondent argues that *Pope* is a "misstatement of element" case as described in *Neder*, 527 U.S. at 10, and that *Pope* "would be more relevant" had it "involved submission of two alternative bases for conviction. . . ." RBM 27 n.23. Respondent does not explain why cases addressing the harmlessness of a single-legal-theory error cannot govern cases of alternative-legal-theory error. To suggest that *Pope* is irrelevant to *Stromberg* is to embrace the anomaly that alternative-legal-theory error (with its unforgiving *Stromberg* test) is necessarily worse than single-legal-theory error (with its relatively lenient "whether the jury still would have convicted" test, as described in *Pope*).

An erroneous legal theory that would be mere trial error if the jury were instructed only on that theory (single-legal-theory error) cannot logically become more serious if the

jury is also *correctly* instructed on an alternative legal theory. *Quigley* v. *Vose*, 834 F.2d 14, 16 (1st Cir. 1987) (per curiam). *Pope* and *Roy* illustrate the principle. In *Pope*, defendants' claim could not have been strengthened if the trial court had instructed correctly, on the "reasonable person" standard, in addition to instructing incorrectly, on the "community" standard. Nor would the defective aiding and abetting instruction have been more serious in *Roy* if the trial court had correctly instructed the jury on the liability of a single perpetrator. A correct instruction cannot make an incorrect instruction worse.[3/] Respondent professes not to rely on the irrational notion that a correct theory in addition to an incorrect one must be worse than an incorrect one alone, RBM 33, but his dismissal of *Pope* as single-legal-theory error rests on that very notion. RBM 27 n.23.

The error in *Stromberg* allowed the jury to convict with either an unconstitutional theory or a constitutional one. That error was no more serious than the error in *Pope*, which permitted a conviction only with an unconstitutional theory. Accordingly, the analysis for harmlessness of alternative-legal-theory errors like those in *Stromberg* and this case must be no more stringent on direct appeal than the "would the jury still have convicted" test in *Pope*. And, in the habeas context, the harmless error test must be still less stringent, under *Brecht*. Because respondent's *Stromberg*-based "conclusively-establishes" test is more stringent than the one in *Pope*, it fails.

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3. Petitioner was trying to make this point in his merits brief in the first sentence of the first full paragraph on page 12, but the inadvertent deletion of the word "no" from the phrase "might be no worse than" changed the meaning of the sentence entirely. Also, the first full sentence on page 27 of that brief is garbled. Petitioner meant to say that alternative-legal-theory error cannot be *necessarily* worse than single-legal-theory error.

C. Because Harmless Error Analysis Does Not Entail Impermissible Judicial Fact-Finding, The *Stromberg* Test Is Not Necessary To Prevent It.

On the premise that harmless error analysis "forbids any judicial reweighing of conflicting evidence or inferences," RBM 29, respondent invokes *Neder* and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to conclude that a reviewing court may not, "under the guise of harmless error, make its own factual determinations on an element which was improperly removed from the jury, when the evidence on that element was 'contested.'" RBM 31; see RBM 32. Respondent contends that *Stromberg* prevents improper judicial fact-finding and is consistent with the *Rose-Neder* line of cases because it requires reversal when "a court's review of the record leaves it uncertain whether the jurors relied on the valid or the invalid theory. . . ." RBM 33; see RBM 34-35.

Respondent mistakes proper harmless error analysis for impermissible judicial fact-finding in the first instance. In a proper harmless error analysis, the reviewing court does not find any elements of the crime. It considers the evidence in conjunction with the jury's particular findings in order to determine what the jury would have decided under proper instructions.

This case illustrates how respondent's and the Ninth Circuit's misconceived notion of harmless error analysis formulaically produces mistaken reversals of valid convictions. As respondent would have it, the jury's failure to find the "contemporaneity" element of aiding and abetting makes the error of failing to instruct on that element prejudicial. The correct harmless error test asks a different question and compels a different result. The jury found at a minimum that respondent aided and abetted robbery as a major participant and with reckless

indifference to human life. J.A. 13. The harmless error question therefore is: given the foregoing findings and the evidence of how respondent aided and abetted robbery, both before and after the killing, would a correctly instructed jury still have convicted respondent of felony murder, properly finding that respondent aided and abetted before the killing?[4/] The answer can only be yes, under any standard. Because respondent's post-killing involvement was minimal if respondent was only an accomplice, the jury's finding that he aided and abetted the robbery as a major participant showed that the jury premised that finding on pre-killing involvement. It follows that the jury would have found pre-killing aiding and abetting under proper instructions. Similarly, because respondent's post-killing involvement could not have endangered the victim's life (by definition) and did nothing to endanger anyone else's life, the jury's finding that respondent acted with reckless indifference to human life showed that the jury based its finding on pre-killing involvement. It follows that the jury would have found pre-killing aiding and abetting under proper instructions.

Suniga v. *Bunnell*, 998 F.2d 664 (9th Cir. 1993), serves as yet another illustration of how respondent's and the Ninth Circuit's misconceived notion of harmless error functions to reverse valid convictions. Charged with murder for shooting the victim, the defendant in *Suniga* claimed the gun fired accidentally. *Id.* at 666. The trial court instructed correctly on malice murder but incorrectly on felony murder, allowing the jury to convict on the latter theory by finding simply that the defendant killed the

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4. In stating this test, petitioner assumes for argument sake that the Ninth Circuit was correct in finding that the "and/or" mistake in one of the special circumstance instructions essentially rendered meaningless the jury's special circumstance verdict form. Petitioner does not accept that assumption. See Argument IV, *post*.

victim in an assault with a deadly weapon (ADW). *Id.* at 666-67.

Without calling the error structural, the Ninth Circuit said the "very strong" evidence of malice was "beside the point" because "this is not a harmless-error case." *Id.* at 670. The court reversed the conviction because the defendant was "exposed to the possibility of conviction of felony-murder ADW when no such theory of criminality exists in California."[5/] *Id.* Citing its version of the *Stromberg* rule, the Ninth Circuit said a conviction must be reversed if the jury received a correct and an incorrect theory of guilt and it is impossible to tell which theory the jury "followed." *Id.* Respondent's test would produce the same result.

A proper analysis in *Suniga* would have found harmless error. Error occurred because the trial court's instruction on felony murder produced a reasonable likelihood that the jury misapplied the law in an unconstitutional manner, *Estelle* v. *McGuire*, 501 U.S. 62, 72 & 72 n.4 (1991) —convicting the defendant of murder based only on a finding of homicide and assault, rather than a finding of malice. But the error was harmless under *Brecht* or even *Chapman* because accident was as much a defense to assault as it was to murder, and the jury rejected that defense by convicting the defendant of assault-based felony murder. Likewise, the evidence and the verdict (flawed though it was) showed that the jury would have found murder under the correct, malice theory if the jury had been instructed only on that theory. In sum: when

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5. This point is irrelevant and misleading. The jury convicted the defendant of a greater offense, murder, by properly finding only homicide and the elements of a lesser offense, assault. The same thing happened in this case. The jury convicted respondent of felony murder by properly finding homicide and the elements of a lesser offense, robbery.

considered in light of what the jury found, the evidence showed (under any standard) that the jury would have convicted if it had been properly instructed.

Like *Suniga*, respondent fails to appreciate the way in which a harmless error analysis considers the evidence—in conjunction with the findings the jury made. That a reviewing court may not itself simply weigh the evidence does not mean (as the Ninth Circuit and respondent have assumed) that a reviewing court may not consider the evidence at all. By restricting harmless error analysis to a determination of what the jury did, rather than what the jury would have done, respondent's test prevents a reviewing court from engaging in the kind of review that this Court's harmless error jurisprudence not only permits but requires.

D. Like *Chapman-Neder*, The *Brecht* Test Requires A Determination Of Whether The Verdict Would Have Been The Same Under Proper Instructions.

In applying *Brecht*, this Court has not expressly adopted the "jury would still have convicted" formulation. But *Brecht* necessarily produces such an analysis. *Brecht* held that references at trial to the defendant's post-*Miranda* silence "did not 'substantial[ly] . . . influence' the jury's verdict" because the impermissible references "were, in effect, cumulative" to other permissible impeachment and because the evidence of guilt was, "if not overwhelming, certainly weighty." 507 U.S. at 639. To find error harmless because improper evidence is "in effect, cumulative" and the proper evidence is "weighty" is tantamount to saying that the jury would still have convicted had the impermissible evidence been excluded. See *Penry* v. *Johnson*, 532 U.S. 782, 796 (2001) (erroneously admitted evidence was harmless under *Brecht* because that evidence "was *by no means the key to* the State's case. . . .")

(emphasis added). Similarly, in *United States* v. *Dominguez*, 542 U.S. 74, 81 (2004), the Court wrote, "In cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief, we have invoked a standard with similarities to the [*Brecht*] formulation in requiring the showing of 'a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different.' [Citations.]" And in *Fry* v. *Pliler*, 551 U.S. _, 127 S.Ct. 2321 (2007), the dissent used this same "but-for causation" approach when it said the unconstitutional exclusion of a witness's testimony was prejudicial under *Brecht* because of "powerful support for the conclusion that if the jurors had heard the testimony . . . they would at least have had a reasonable doubt concerning petitioner's guilt." *Id.* at 2328 (Stevens, J., dissenting). Under the *Brecht* test, just as under the more stringent *Chapman* test, a reviewing court must decide whether the jury would still have convicted under proper instructions.

II.

STROMBERG'S APPLICATION TO DIRECT CIVIL APPEALS POSES NO INCONSISTENCY WITH THE *BRECHT* TEST IN FEDERAL HABEAS CASES.

Citing decisions applying *Stromberg* on direct review of civil trials, RBM 42-43, respondent argues that an "abandonment of the *Stromberg-Griffin* rule here would also doom the similar civil rule. . . ." RBM 45. As he reads *O'Neal* v. *McAninch*, 513 U.S. at 440-41, and the case from which *Brecht* derives, *Kotteakos* v. *United States*, 328 U.S. 750, 762-63 (1946), the Court has "admonished that the *Kotteakos-Brecht* standard must be at least as rigorous as civil appellate standards," RBM 45, if not more so. RBM 44.

O'Neal did not "admonish[] that the *Kotteakos-Brecht*

standard must be at least as rigorous as civil appellate standards." *O'Neal* said civil and criminal cases are the same in the way they resolve the rare situation in which a judge is in "grave doubt" (or "equipoise") as to harmlessness. *O'Neal*, 513 U.S. at 441. To observe that civil and criminal cases treat such "ties" the same way is not to imply that the harmless error standard *itself* is the same in both kinds of cases. Nor does it follow from the equivalent treatment of "ties" that harmless error analysis must be at least as stringent on federal habeas as on direct appeal in civil cases.

Kotteakos is similarly unhelpful to respondent. The Court there observed that the precursor of the current federal harmless error statute "did not require the same judgment [in a criminal case] as in one involving only some question of civil liability." *Kotteakos*, 328 U.S. at 763. "There was no purpose, for instance, to abolish the historic difference between civil and criminal causes relating to the burden of proof placed in the one upon the plaintiff and in the other on the prosecution." *Id.* Because *Kotteakos* allows for treating criminal and civil cases differently, the *Stromberg* rule may be eliminated from criminal-case harmless error review without affecting civil cases.

Respondent's demand for exact parity between the civil and criminal tests is particularly inapt in the habeas context. A federal habeas court reviews a state-court criminal judgment affirming the jury's verdict, so the balance of interests is necessarily different in such a case, see *Brecht*, 507 U.S. at 634-37, than it is when a reviewing court has yet to adjudicate a civil litigant's claims of reversible error. Even beyond the collateral nature of habeas proceedings, special federalism interests of finality and comity historically have restricted the availability of the habeas writ. See *id.* Those interests justify a harmless error test in habeas cases less stringent than the one applied on direct appeal in an ordinary civil case.

Finally, any arguable inconsistency between exclusion of *Stromberg* from criminal/habeas cases and application of *Stromberg* in civil cases would be dwarfed by the inconsistency that would arise *among* criminal cases if *Stromberg* were part of the *Brecht* test in habeas cases, as respondent proposes. As shown above, it makes no sense to apply a *Stromberg*-type test in cases of alternative-legal-theory error when the correct harmless error test for other, indistinguishable instructional errors remains whether the jury would have convicted under proper instructions.

III.

AEDPA Restrictions On The Granting Of Habeas Relief Are Not Mooted By Respondent's Concession That *Brecht* Governs This Case.

Fry v. *Pliler*, 127 S. Ct. at 2327, stated, "[I]t certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." Respondent asserts that such duplication is present here, RBM 47, and, accordingly, that "the state's attempt to frame its bid to overturn *Stromberg* in the language of AEDPA, PBM 11-16, adds nothing to its argument." RBM 48. Respondent ignores the fact that he seeks to reconfigure not only *Brecht* but also *Chapman*. As explained below, his position would, if accepted, subvert the AEDPA principle that a habeas court may not grant the writ unless the state court unreasonably applied this Court's "clearly established" precedent. 28 U.S.C. § 2254(d)(1).

The Ninth Circuit reasoned in effect that (1) alternative-legal-theory error is governed by *Stromberg*; (2) alternative-legal-theory error is "structural"; (3) *Brecht* does not apply to structural error; and, therefore, (4)

application of *Stromberg* alone is required. The parties now agree that the error is not structural and that *Brecht* applies. They disagree whether *Stromberg* governs alternative-legal-theory error. Respondent believes it does because, in his view, *Stromberg* is part of *Brecht*. But to reach that position, he relies on the notion that *Stromberg* is also incorporated in *Chapman*. RBM 35-41. Accordingly, one could not apply *Brecht* in this case in the *Stromberg*-infused way respondent urges without first deciding that *Stromberg* is also part of *Chapman* in cases of alternative-legal-theory error.

If respondent's position were correct, state courts would be required to apply *Stromberg* to alternative-legal-theory error but not to single-legal-theory error (which, all agree, is at least ordinarily governed by the "jury would still have convicted" version of *Chapman*). The battle would then shift to one of error characterization. To decide which form of *Chapman* review applies, state courts would have to decide whether the instructional error constituted alternative-legal-theory error or single-legal-theory error. If the state court classified the error as "only" single-theory error and a federal habeas court disagreed, the habeas court would proceed under respondent's proposal to apply respondent's unforgiving *Stromberg-Brecht* test—even if the state court's classification of the error as single-theory error was reasonable. AEDPA deference to the state court's initial characterization of the error would vanish.

As just suggested, respondent's "*Stromberg* is *Chapman*" approach would exalt form over substance. Instead of the required analysis of whether a given instructional error is structural, see *Neder*, 527 U.S. at 14 ("constitutional error is either structural or it is not"), respondent would have courts focus on the labeling of instructional defects as either alternative-theory error or single-theory error. Such arid debates are the antithesis of

this Court's modern harmless error jurisprudence. See *Neder*, at 10 (differently labeled errors that preclude jury from making a finding on an element of the offense are non-structural). Moreover, the labeling debate would be all but dispositive on habeas review, eliminating AEDPA-required deference to state-court determinations of harmless error.

Precisely because *Brecht* subsumes AEDPA/*Chapman*, AEDPA remains part of this case. Respondent's effort to enshrine *Stromberg* in *Brecht* and *Chapman* contradicts this Court's harmless error law and, as a result, undermines both *Brecht* deference on habeas and AEDPA deference to reasonable applications of clearly established Supreme Court law.

IV.

REMAND IS REQUIRED BECAUSE THE NINTH CIRCUIT DID NOT APPLY *BRECHT*.

Arguing in effect that the Ninth Circuit unwittingly but correctly applied *Brecht* when it applied *Stromberg*, respondent proceeds to defend the particular findings the Ninth Circuit made. RBM 51-53. As explained in Argument I, respondent misconstrues the *Brecht* test. Since the Ninth Circuit's findings were inadequate to justify the result under the correct standard, this Court need not consider them further.

In any event, the Ninth Circuit's main premise is mistaken. The court found that the "and/or" special circumstance instruction eviscerated the meaning and significance of the jury's special circumstance verdict. Pet. App. 10a-11a. In so finding, the Ninth Circuit incorrectly adopted the most damaging possible interpretation of the instruction without considering it in context. See *Estelle* v. *McGuire*, 502 U.S. at 72 (instruction must be considered not in artificial isolation but in the context of the

instructions as a whole and the trial record).

In addition, the court failed to consider that the jury found, at a minimum, that respondent aided and abetted the robbery as a major participant and with reckless indifference to human life. J.A. 13. Respondent, too, ignores that finding. As noted earlier, the jury showed by its "reckless indifference/major participant" findings that it also would have concluded, had it been properly instructed, that respondent aided and abetted the robbery before the killing.

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Stromberg is not a test of prejudice under *Brecht*, as respondent believes. Neither is *Stromberg* clearly established as structural error and, thus, a valid reason for avoiding *Brecht*, as the Ninth Circuit believed. *Stromberg* yields findings of reversible error that *Brecht* precludes. Accordingly, this case must be remanded for the Ninth Circuit to review the error for harmlessness under a proper application of *Brecht*, shorn of concepts and authorities rooted in *Stromberg* or structural error doctrine.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Dated: August 8, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California

DANE R. GILLETTE
Chief Assistant Attorney General

MANUEL M. MEDEIROS
State Solicitor General

GERALD A. ENGLER
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy State Solicitor General

PEGGY S. RUFFRA
Supervising Deputy Attorney General

JEREMY FRIEDLANDER
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

JF:er
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